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Intellectual Ammunition

a publication of The Heartland Institute

Potshots

Sprawl is caused by affluence and population growth, and which of these exactly do we propose to prohibit?

GREGG EASTERBROOK

Somehow, merely the status of being a "mom" is supposed to trump facts and linear thinking. That is the theme of the Million Mom March [for gun control]: I don't need a brain—I've got a womb.

ANN COULTER, SYNDICATED COLUMNIST

Do not use while sleeping.

WARNING LABEL ON HAND-HELD HAIR DRYER

In Minnesota, the visit of the President is important, but it takes second place to walleye.

MINNESOTA GOVERNOR JESSE VENTURA

"Vegetarian" is an old American Indian word for "bad hunter."

ILLINOIS ANGLER LANNY CHOUINARD

Necessity is the excuse for every infringement of human freedom. It is the argument of the tyrant and the creed of the slave.

ENGLISH POLITICIAN WILLIAM PITT, 1763

A low-taxing government that leaves its citizens free of arbitrary controls while administering hugely expensive programs to protect them against any unpleasant contingency—well, that's like asking for dry water.

STEPHEN CHAPMAN, SYNDICATED COLUMNIST

AOL Must Now Fight the Tiger It Once Rode

by Dave Kopel

In the modern telecommunications and computer industry, no company has worked more aggressively to use the power of government against its business rivals than has America Online. It is poetic justice—and a good warning to the rest of the digital world—that the federal government is now seeking to "crack down" on AOL.

The Federal Trade Commission has announced it will launch an antitrust investigation of the proposed AOL merger with Time/Warner; the investigation will be aimed at AOL's "instant messaging" services. (Instant messaging—faster than email—allows people who are logged onto the Internet to communicate immediately, by having a typed conversation in real time.)

AOL owns the largest instant messaging service, AOL Instant Messenger, and the second-largest service, ICQ (developed by an independent company, which AOL then bought). Together, the two AOL services have well over half of the instant messaging market.

Time/Warner, on the other hand, doesn't own any instant messaging properties. But TW does own lots of cable television lines, and those cable lines are being upgraded to provide high-speed "broadband" Internet connections to consumers' homes. The FTC is apparently worried that AOL/TW will use its market power in instant messaging to dominate whatever instant messaging will be used for in a broadband context.

SPECULATIVE RESULTS

The FTC case shows the worthlessness of antitrust. AOL hasn't done anything wrong in achieving its current leading position in instant messaging. By combining AOL's instant messaging expertise with Time/Warner's cable pipes, AOL may be able to bring all sorts of new benefits to consumers. Rather than let the consumers decide, however, the FTC is speculating on what may benefit the marketplace.

If this reminds of you of the Microsoft antitrust case, it should. There, even the government's chief expert, economist Franklin Fisher, admitted Microsoft had harmed competitors, but had done nothing to harm consumers "up to this point." Yet Microsoft is to be prevented from entering new markets, and to be split in half, because of speculation about alleged harm that "might" happen in the future.

The federal case against Microsoft was, of course, instigated at the behest of Microsoft's inferior competitor, Netscape, which is present-

continued on page 3

In This Issue

Crime	4	Taxes	12
Education	5	Technology	13
Environment	6	Welfare	14
Health Care	7	Point of View	15,18
Law	8	Excerpt	16
Privatization	10	Contacts	20
Regulation	11		

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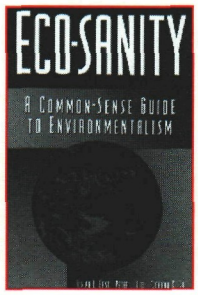

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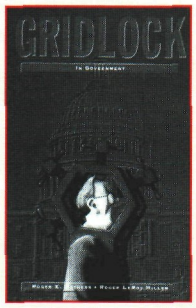

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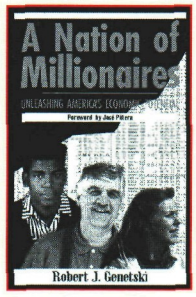

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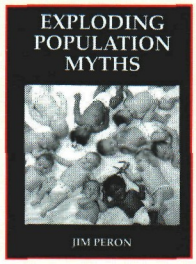

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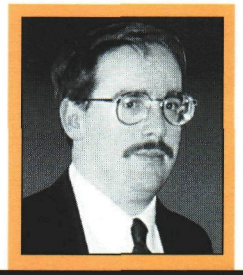

News from the Heartland

by John R. La Plante
Managing Editor

The American desire for equality, combined with the public's growing impatience with the slow and uncertain nature of the legislative process, are beginning to add "school budget chief" to the résumés of judges across the country.

Advocates of equalized school spending, dissatisfied with their lack of success in state legislatures, are turning to state courts and getting results. Richard Komer, writing in this issue's law column, and education columnist George Clowes examine this phenomenon.

"Judges," Komer writes, "are ill-suited by either temperament or training to administer school districts or make funding decisions." Clowes notes that in Ohio, the state's highest court recently "assumed authority to veto further action by state lawmakers on education funding."

In a Point of View column, Cato Institute fellow Doug Bandow addresses the issue of policy-through-litigation more generally, and concludes: "Politics is a bad way to make policy. Litigation is worse."

NEW COLUMNISTS

We welcome two new columnists with this edition of *Intellectual Ammunition*.

Bartlett Cleland will write our new technology column. In coming months he will address the policy questions relating to changing technology, including data privacy, the Internet, and intellectual property. Cleland directs the Center for Technology Freedom at the Institute for Policy Innovation. He was formerly Technology and Policy Counsel for Americans for Tax Reform, and earlier, counsel to Missouri Senator John Ashcroft. He welcomes your comments at Bcleland@IPI.org.

Jonathan Adler, our long-time columnist on environment issues, has left the think-tank world for the legal one. In his stead, his former colleagues from the Competitive Enterprise Institute take over. **David Riggs**, CEI's director of land and natural resource policy, comments in this issue on the recent wildfires ravaging federal lands near Los Alamos, New Mexico.

Riggs, who earned a Ph.D. in applied economics from Clemson University, was previously a senior fellow at the Center of the American Experiment, a state-based think tank located in Minneapolis, Minnesota.

BE CAREFUL WHAT YOU ASK FOR

In our cover essay, Dave Kopel dissects the political strategy of AOL, America's most popular way to connect to the Internet. AOL, now owning the kind of property it once wanted subjected to federal regulation, is a late convert to the principle of private property rights. Too late. Federal regulators have turned their attention to AOL itself.

OTHER COLUMNS

No state, perhaps, has done more to carry out the vision of a single-payer health care system than Tennessee. As Patrick Poole writes for the Tennessee Institute for Public Policy, the Volunteer State is suffering from rising budget pressures and declining quality in health care as a result of its TennCare program. Poole's study, which is our featured excerpt, offers a warning to other states on the perils of government-driven approaches to health care.

In her column, Twila Brase notes that Americans are of two minds on the Internet as a health care tool: excited about its usefulness as a source of general information, but wary of potential abuses that might accompany the use of personal medical information.

Other columns address rehabilitation of criminals, infrastructure development, regulatory policy, state tax rates, and racial discrepancies in child poverty rates. ia

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continued from page 1

ly owned by AOL.

One "remedy" the FTC is examining is to require AOL to open up its instant messaging system, so people who use other instant messengers (e.g., programs from Yahoo or Microsoft) can communicate with AOL customers.

AOL has so far insisted, quite rightly, that the AOL and ICQ instant messengers are AOL's property, and if AOL doesn't want to enable communication with non-AOL programs, it shouldn't have to. Over the past year, AOL has been engaged in a technical war with other instant messaging companies; as the other companies invent new ways for their own customers to communicate with AOL's customers, AOL invents new ways to block them.

No company has worked more aggressively to use the power of government against its business rivals than has America Online. It is poetic justice that the federal government is now seeking to "crack down" on AOL.

But the most amazing thing about the AOL war against open access to its instant messaging isn't the code-writing battle: it's AOL's hypocrisy. Even while AOL was fiercely resisting industry pressure to open up its instant messengers, AOL was lobbying (with the "Open Access" coalition) to force AT&T to open up its cable television lines to AOL!

AT&T owns various cable television properties, and is hard at work to bring high-speed Internet access to the home, via those cable television lines. If you sign up with AT&T for "cable modem" Internet service, your Internet Service Provider (ISP) will be Excite@Home, an affiliate of AT&T. For the past several years, AOL and other slow, narrow-band Internet Service Providers have been waging a mostly unsuccessful lobbying campaign to force AT&T to let these rival ISPs use AT&T's cable lines—at the same price as AT&T's own affiliate.

With its purchase of Time/Warner, AOL became the owner of millions of cable television lines. AOL promptly dropped out of the "Open Access" coalition and decided that markets, not government, should decide Internet access.

ONLINE SERVICE TO ISP

Few companies in the digital economy are as experienced as AOL at trying to misuse government power. In the year before the introduction of Windows 95, AOL conducted another political campaign, trying to use the federal government to prevent Microsoft from competing with AOL. At the time, the Internet was just beginning to attract consumers' interest. Most people who went online for information used not the Internet but an "Online Service" (OLS) such as AOL, Prodigy, Compuserve, or Genie. The online service allowed its subscribers into the "walled garden" of content owned by the OLS. Subscribers could send e-mail to other subscribers to the same OLS, but not to the full world of e-mail users.

Microsoft announced it would start its own Online Service, "the Microsoft Network" (MSN). The Windows 95 desktop would include an icon to allow consumers to sign up for MSN. Computer manufacturers were free to add icons for other companies (e.g., AOL) to the desktop.

At the time, Microsoft had a market share of exactly zero in the OLS business. AOL promptly ran to the federal government, and began complaining that Microsoft's plan to start competing in the OLS business was "anti-competitive" and a violation of antitrust laws.

Supposedly, consumers would sheepishly click on the MSN icon, and MSN would almost immediately overwhelm all the other OLS companies. *Newsweek*'s Steven Levy hysterically predicted that because of MSN, "One day, dollar bills may be replaced with Bill Dollars, and a piece of every online transaction could go through Microsoft's bulging coffers."

In a surprising fit of common sense, the Department of Justice decided that preventing a company from competing in a new market would be difficult to justify on antitrust grounds. Windows 95 debuted with the MSN icon intact, and MSN went on to become the most expensive failure in Microsoft's history. The MSN content was weak, the interface was horrible, and the installation routine was lengthy and error-prone.

AOL, meanwhile, made its interface better and better, and marketed itself incessantly through free sign-up disks and by paying computer manufacturers to include an AOL icon on the Windows desktop screen. Today, AOL has gobbled up Compuserve, and now boasts 21 million subscribers. The Microsoft Network is now merely one of many Internet Service Providers with a free web portal.

It would be nice if AOL had learned enough from the MSN episode to feel confident that the company can compete pretty well in a free economy. But instead, AOL's executives and cadre of lobbyists act like a cartel, determined to use every possible government lever to protect the company from competition.

With its purchase of Time/Warner, AOL decided that markets, not government, should decide Internet access.

In the long run, inciting government attacks on one business makes every business less secure. As President Kennedy observed, regarding Third-World nations that flirted with the Soviets, "He who rides a tiger dare not dismount."

Now that the tiger is starting to eat AOL, perhaps the other digital companies that worked so hard to encourage the federal government to persecute Microsoft may start to have second thoughts. More likely, though, nothing will change, and they too will end up in the tiger's belly.

❖

Dave Kopel, director of the Center on the Digital Economy at The Heartland Institute, is author of "Access to the Internet: Regulation or Markets," a policy study published by Heartland last year. He is also research director for the Golden, Colorado-based Independence Institute.

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Crime

Morgan Reynolds

Morgan Reynolds is director of the Criminal Justice Center at the National Center for Policy Analysis.

Crime in Their Hearts, Even After Release

Crime has declined for eight consecutive years while a massive prison buildup has almost doubled the number of Americans behind bars to two million. Another 4.1 million are out on probation or parole, and two out of three of them are felons.

The crime decline certainly suggests that prison works, but the latest fashion in criminal justice circles is to worry about what to do about the growing number of prisoners set free each month. All but 5 percent of inmates get out of jail and most do not seem to be "rehabilitated." According to the Department of Justice, approximately 585,000 felons will be released from state and federal prisons this year, and 62 percent of them will eventually be charged with new crimes.

"The system is set up to produce failure," says John Carver III, District of Columbia parole chief. Release involves little preparation or follow-up. So what to do about the high relapse rate?

Attorney General Janet Reno believes the answer lies in nine pilot projects known as reentry courts—modeled after drug courts—as well as demonstration projects designed to increase counseling, therapy, training, and support for returning convicts. She wants millions of dollars in new money for intensive court supervision that would parallel or replace the existing parole system.

Marc Mauer of the Sentencing Project dissents from this plan and says we already know what is needed: "Education, health, and job services for the ex-offender."

THE CHOICE WITHIN

Both Reno and Mauer are wrong. They should interview Stanton Samenow, author of *Straight Talk About Criminals.* He's the rare psychologist who understands criminals and has helped many to become responsible human beings.

Conventional wisdom about helping criminals, while well-intended, is totally wrong. Criminals are not hapless victims of disadvantaged circumstances who just need more understanding and resources. They rejected school, jobs, and the straight life long ago.

"People become criminals through conscious choice," says Samenow. "[But we] resist accepting the fact that there are individuals who regularly choose evil over good. . . . People from all sorts of environments choose to commit crimes."

"Criminality resides within the individual, not the environment, which only provides greater or less opportunity," according to Samenow. The criminal is a victimizer who injures others in pursuit of excitement and his own ego gratification, not the victim he portrays himself to be.

"Behavior is largely the result of the way a person thinks," says Samenow, so the criminal must change his way of thinking. Most efforts to help criminals go straight overlook this inconvenient fact.

Rehabilitation is a misconception when applied to criminals. The criminal cannot be restored to something he never was. Habilitation means changing the way the offender thinks, not tinkering with his social conditions. Habilitation does not dictate his decisions but helps him to change his thinking process so that he functions responsibly.

To succeed, counselors and other professionals who work with criminals must adopt a stance at odds with their current training, says Samenow. Instead of trying to comfort the afflicted, they have the unpleasant task of getting the criminal to look in the mirror at himself and recognize his worst features. The counselor must afflict the comfortable criminal. And it's a long and tedious process to convert a criminal into a responsible person.

Behavior is largely the result of the way a person thinks. Most efforts to help criminals go straight overlook this inconvenient fact.

Some people with a criminal personality are not willing to change. They're a "write-off," and society must be protected from these predators. That's surely what prisons are for. Other prisoners are amenable to habilitation and clearly have the capacity to make different choices. Knowing how their minds work and approaching them when they are vulnerable (willing to change) can start them on the road to personal responsibility.

Legal leverage helps to provide vulnerability. The threat of bad consequences stimulates motivation to change.

Samenow's theory explains a lot. Boot camps and similar programs fail because they're "like trying to kill a weed by snipping off the top but failing to pull it up by the roots." Isolated programs to teach specialized occupational or social skills fail because they do not change the thinking processes necessary to use skills responsibly.

The down side to Samenow's insights is that individual reform is demanding, time-consuming, and expensive. That leaves lots of room for more prisons.

FOR MORE INFORMATION...

Preventing Crime, Saving Children
Monitoring, mentoring, and ministering are all promising avenues. (Center for Civic Innovation, February 1997, 27pp.)

Fax Call **312/377-3000** and request documents **#1300413** and **#1300414**

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Education

George Clowes

George Clowes is managing editor of *School Reform News*, a monthly newspaper published by The Heartland Institute.

March Toward Funding Equality

In the most recent round of battles over school funding formulas, Ohio's Supreme Court found that the state depends too much on local property taxes to fund public schools. On May 11, in a 4-3 decision, the court found the state's education funding formula unconstitutional.

The court assumed authority to veto further action by state lawmakers on education funding. With this ongoing monitoring, the court in effect asserted veto power over education funding decisions made by the state legislature. The court also ordered lawmakers to "immediately" fund the unfunded mandates it has imposed on school districts.

The experience of other states, though, does not suggest that education in Ohio will proceed as the justices plan.

> *Serrano required that all local property taxes collected in California be delivered to the state for equal distribution among all school districts. So voters overwhelmingly voted to slash local property taxes.*

DEJA VU IN CALIFORNIA

On May 17, the American Civil Liberties Union sued the state of California, saying that "appalling conditions" regarding safety, sanitation, and educational resources in public schools serving low-income children violated the state constitution's guarantee of a free and equal public education for all.

The lawsuit comes as a surprise, since every student in California—including low-income students—has been funded equally for the past quarter-century as a result of the *Serrano v. Priest* case in 1971, the first of the equalized school finance rulings. The *Serrano* ruling was supposed to correct gross disparities in educational resources between school districts caused by different levels of funding in different districts.

One result of *Serrano*'s divorcing of public school financing from local property taxes was Proposition 13 in 1978. *Serrano* required that all local property taxes be delivered to the state for equal distribution among all school districts. Understanding that high local property taxes would no longer benefit their local schools, voters overwhelmingly approved Proposition 13 to slash local property taxes.

Testifying before a U.S. Senate Committee, the late Professor Charles Scott Benson warned: "You must be very careful when you wish for things because you may just get what you wish for. We worked hard for equity in California. We got it. Now we don't like it."

CHANGED PRIORITIES IN ARIZONA

In 1994, the Arizona Supreme Court ruled that it was unconstitutional for school districts to rely on unequal property tax bases to fund school construction, demanding that the legislature create a more uniform funding mechanism.

As a result, today a state board decides which old schools will be maintained, and how, and which new schools will be built, and where. Local communities that never bothered to build schools before now are demanding them, according to a recent report from the Goldwater Institute.

For example, the Vail School District used to enroll its older students in nearby districts, thereby avoiding the need to build a high school at local expense. But after the new school construction system went into effect last year, the district requested a new high school from the state board, sending two busloads of residents to Phoenix to lobby for the project. Funding for a new school was approved—at the expense of all Arizona taxpayers, not Vail residents.

NEW HAMPSHIRE

After the New Hampshire Supreme Court's 1997 ruling that the state's local property tax was an unconstitutional means of funding public education, the state legislature instituted a statewide property tax, which resulted in property-rich towns "sending" tax dollars to property-poor towns.

Now that a new stream of state revenue is flowing into the property-poor towns, officials are dismayed to find that voters still are not willing to raise their taxes to pay for school improvements.

VERMONT

In 1997, in response to a court ruling, the state established equal funding of all schools and approved a statewide property tax. This increased the tax rate in so-called property-rich towns while simultaneously cutting their school budgets. Many of those towns wanted to restore the funds cut from their school budgets, but found that if they raised local property taxes even higher, a large portion of the new taxes would still go to the state.

So parents in Stowe decided to ask for donations for the local school, and they raised $2 million that way. But now the local chapter of the American Civil Liberties Union wants every dollar raised locally, by bake sales or other fundraising activities, to be deducted from the state allotment to that district. That way, every child in a Vermont public school will be funded at the same level.

FOR MORE INFORMATION...

DeRolph v. Ohio
The Ohio Supreme Court strikes down the state's funding forumula. (Ohio Supreme Court, May 2000, 51pp.)

Fax Call **312/377-3000** and request documents **#2124810** and **#2124811** (majority opinion) and **#2124812** (dissent).

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Environment

David W. Riggs

David W. Riggs is director of land and natural resource policy at the Competitive Enterprise Institute.

Federal Land Mismanagement: What's Smokey Smokin'?

You may have seen the recent editorial cartoon—a picture of Smokey Bear, complete with Park Service Ranger cap and shovel, with a caption that reads "Only You Can Prevent Me from Starting Forest Fires."

True enough, the devastating wildfire near Los Alamos, New Mexico began as a prescribed burn set by the Park Service at Bandelier National Monument. But you may not be aware that this wildfire was a predictable result of federal land policy and an indication of things to come.

FIRE SUPPRESSION

Smokey Bear's caution "only you can prevent forest fires" symbolizes decades of fire suppression by the federal government. Although many of us have fond memories of the fire-conscious bear, fire suppression, which puts out fires as soon as they are discovered, has resulted in an unnaturally large buildup of dry, highly flammable excess wood in the nation's forests. The dead and dying wood accumulating in forests threatens the lives and property of people who live nearby, and damages the ecological health of forests as well. Fire suppression leaves more wood in the forest to burn tomorrow, and the fire hazard continues to grow.

[The Los Alamos] wildfire was a predictable result of federal land policy and an indication of things to come.

Federal land management agencies, which have mismanaged lands in the past by suppressing all fires, now limit management options to prescribed burns. Excess timber can be burned in small, prescribed fires or removed mechanically. Federal forest management has placed a priority on prescribed burns as the method of keeping the forest clean of its excess fuels. Prescribed burns should occur only when weather and moisture conditions are just right, and they must be performed with the proper frequency.

But past fire suppression efforts have created conditions that make prescribed burns difficult to control. The Los Alamos fire started as a small, prescribed burn that quickly went out of control, leaving a trail of devastation. The fire forced 20,000 people to evacuate, burned 220 homes, left 400 families homeless, and caused an estimated $1 billion in damage.

The fire also damaged the environment by charring over 44,000 acres, destroying animal and plant habitats, and releasing tons of pollutants into the air. Other prescribed burns have had similar outcomes; the fire in northern California last year, for example, burned 23 homes.

Catastrophic forest fires burn very intensely and cause enormous damage to soils, watersheds, fisheries, and other ecosystem components. Plus, as the Los Alamos fire amply demonstrates, people and their property are at tremendous risk when they live adjacent to these national tinderboxes.

OR MECHANICAL REMOVAL?

Unless surplus wood is removed mechanically through thinning, brush clearing, and partial harvesting, most of it has to burn, eventually. Mechanical harvesting allows forest managers to remove dead, diseased timber and underbrush, without the risk of catastrophic forest fire.

But the option of mechanical removal appears increasingly at odds with the federal government's policies. Since 1989, harvest levels in forests have fallen from 12 billion board feet per year to less than 4 billion today. And in the very same week as the Los Alamos fire, the Forest Service announced a new moratorium on road building on 43 million acres of National Forests. This moratorium limits forest management by making timber harvesting all but impossible (imagine trying to remove excess timber without roads).

If mechanical removal is forbidden and prescribed burns are unable to fully complete the job, then the *de facto* policy amounts to waiting for large and unplanned forest fires.

The Park Service superintendent who ordered the Bandelier prescribed burn in unfavorable weather conditions has been put on administrative leave. Federal policy, though, set the stage for the Los Alamos fire, and similar conditions exist today on about 40 million acres of the National Forest system.

Many other cities in the western United States face a similar fire hazard, according to Robert H. Nelson, an 18-year veteran of the Department of Interior and author of the recently released book, *A Burning Issue: A Case for Abolishing the U.S. Forest Service*. It is only a matter of time until cities across the west will be confronted with their own menacing conflagrations.

Nelson makes a strong case that if we continue to put dangerous and ineffective policy above common sense, we will continue to see more fire disasters like Los Alamos.

FOR MORE INFORMATION...

Ending the Forest Fire Gridlock
Local officials are better positioned than their federal counterparts to maintain forests. (Competitive Enterprise Institute, March 1999, 2pp. (summary))

Fax Call **312/377-3000** and request document **#2316305.**

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Health Care

Twila Brase, RN, PHN

Public health nurse Twila Brase is president of Citizens' Council on Health Care.

Public Resists Online Medical Records

Survey after survey finds the American public alternately concerned and excited about the new information society of the Internet. While the Internet offers unprecedented freedom, it also allows the possibility of significant surveillance of medical records.

Nowhere are these two possibilities more under consideration than in the minds of the growing numbers of individuals who access the 15,000 to 20,000 Web sites providing health care information.

According to the latest survey of Internet use conducted by Georgia Tech's Graphic, Visualization & Usability Center, nearly 81 percent of 3,291 respondents had used the Internet for accessing medical information. Nearly 43 percent sought health-related information on a monthly basis; almost 20 percent perused medical sites on a weekly basis.

While the Internet offers unprecedented freedom, it also allows the possibility of significant surveillance of medical records.

Compare this frequent Internet use with the caution found by the Ethics Survey of Consumer Attitudes about Health Web Sites. The survey, conducted in January by the California HealthCare Foundation (CHCF), found that at least 51 percent of 1,000 online respondents are concerned about invasions of health care privacy. Three out of four, or 75 percent, worry about health care sites sharing their health data without consent. Furthermore, 70 percent fear that insurers could access submitted information and limit health coverage, 55 percent fear employment discrimination based on information shared online, and less than 50 percent trust any medical or health care site to keep personal information private. In fact, 17 percent choose not to seek health information on the Internet because of privacy concerns.

A HEALTH INFORMATION INFRASTRUCTURE

When the Clinton administration began its push to build a National Information Infrastructure (NII), it touted health care uses to include telemedicine, standardized electronic payment of health care claims, personal health information systems, and computer-based patient records. The health care portion of the NII, the "health information infrastructure" (HII), or "telehealth," was said to "improve clinical care, monitor public health, and educate consumers [and] patients."

A 1998 NII concept paper by the National Committee on Vital Health Statistics foresaw that clinical encounter data would be a core component of the HII, and proposed three types of electronic records (patient health, personal health, and population health). The committee then cautioned that "the sensible application of information technology to the health of Americans will only occur if the public is assured that people's health records or other personal health information will not be used to harm them, and that individual privacy will not be abused."

Advocates of the NII have a long way to go. The California HealthCare survey found that 40 percent of online adults do not want their medical records online. According to the survey report, "Online medical record keeping, even if access is restricted to an individual and his or her physician, is perceived as the greatest threat to individual privacy."

Doctors aren't exactly excited about online medical records, either. In a March 2000 report, "Why Doctors Hate the Net," Forrester Research reported that health care executives are "counting on physicians as part of their own online plans." But only 10 percent of doctors who are active on the Internet thought physicians saw the Internet as useful for obtaining or transferring medical records. A random survey of 1,084 doctors done this year by the American Medical Association found similar results.

OPEN RECORDS

Citizen and patient fears about privacy invasion are not helped by the recently proposed federal health data regulations, which carry the title of privacy protection but do nothing to guard privacy. Instead, officials at the Department of Health and Human Services propose, for the sake of new "national priorities," to open individually identifiable medical records to researchers, law enforcement agents, public health departments, and government auditors and overseers—all without patient consent.

Patients have primarily two requirements of the health care system: delivery of care and the promise of confidentiality. Proposals to "balance" the privacy needs of the public with government-generated national priorities are a losing proposition for patients. This is David against Goliath without a slingshot.

Although the Internet offers exciting possibilities for accessing general and diagnosis-related medical information and research results, the public shows no signs of embracing the more comprehensive online goals of federal officials and health plan executives. Efficiency, convenience, and easy access appear to pale in importance when compared to the individual independence and freedom from fear that off-line medical privacy offers.

FOR MORE INFORMATION...

Privacy and Private Sector Databases
Congress can make privacy concerns worse or better. (Cato Institute, 1999, 7pp.)

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Law

Richard Komer

Richard Komer is a senior attorney at the Washington, DC-based Institute for Justice.

Why Judges Should Not Make School Funding Decisions

Ever since the 1970s, federal and state judges have assumed increasing authority over decisions affecting the funding of public schools. Humility is a characteristic rarely associated with lawyers, but judges can oftentimes give new meaning to the word hubris. While by no means solely responsible for the sorry state of the nation's public schools, these judges must shoulder a substantial part of the blame.

Judges got involved in making funding decisions as a result of two legal developments. The first was the end of legal segregation—accomplished in the Supreme Court ruling *Brown v. Board of Education,* in 1954—and its aftermath. In the early 1970s, judicial impatience with the slow pace of desegregation led to increasingly interventionist remedies, including forced busing. Efforts to avoid forced busing and its untoward effects (such as white flight) led to alternative remedies like magnet school programs, all with significant financial implications.

Judges are ill-suited by either temperament or training to administer school districts or make funding decisions.

EQUITY DECISIONS INCREASE SPENDING

The second legal development was the school equity movement, which began in California and spread gradually until virtually every state supreme court has had to address such cases, often more than once. Initially brought under the federal equal protection clause, school equity cases alleged that basing public school financing on local property taxes discriminated against property-poor districts. Once the U.S. Supreme Court held in *San Antonio School District v. Rodriguez* that the federal equal protection clause was not violated by this funding method, school equity advocates turned their sights on state equal protection guarantees.

Roughly half the state supreme courts have upheld the use of local property taxes as an essential component of school financing, reflecting and encouraging a policy of local control of schools. The other half held their state constitutional guarantee of equal protection was violated and mandated corrective actions. The result in those states, invariably, was greater centralization of control and finances.

While school desegregation has largely been a federal court development, after *Rodriguez* the school equity developments have occurred exclusively in state courts. In either case, the financial consequences of judicial decision-making have been immense: huge expenditures or major reallocations of resources. Sadly, there has been little if any improvement in educational performance.

The Kansas City, Missouri public school district, for example, spent over $2 billion in an effort to desegregate its schools by attracting white students back to the system. The district's creation of outrageously expensive magnet schools proved futile, making Kansas City the best-known example of failed judicial intervention.

FEW POSITIVE RESULTS

California and New Jersey, the states that pioneered school equity in the 1970s, have seen their public schools undergo massive declines. The California public schools, which once led the nation, have plummeted in quality. The judge-mandated redistribution of resources engendered by the school equity decisions is not exclusively to blame. The willingness of the public school bureaucracy to force the schools to follow a series of educationally catastrophic pedagogical fads, like whole language and bilingual education, is also responsible. Even here, though, the school equity decisions contributed indirectly to the failure, by encouraging the centralization of the system.

In New Jersey, despite massive increases in per-capita spending in the poorest school districts, performance has remained so low that the state has taken centralization a huge step further, with the state taking over school districts in Jersey City, Camden, and Newark. Even after 10 years (in the case of Jersey City), there has been little positive effect. Although academic performance has languished, New Jersey public school teachers enjoy the highest salaries in the nation.

Ohio is the most recent state whose supreme court has started it down the school equity path, so we can now watch the state courts supervise the funding of Ohio's public schools. Don't hold your breath waiting for significant improvement!

Judges are ill-suited by either temperament or training to administer school districts or make funding decisions. Rarely are they accountable to the taxpaying public, and the authoritarian nature of their role frequently leaves judges lacking the flexibility needed to properly evaluate what needs to be done. All too often, judges behave like modern-day descendants of the pharaohs, intoning "So let it be written, so let it be done, and damn the consequences!"

FOR MORE INFORMATION...

How Judges Are Making Public Schools Worse
As bad as public school boards sometimes are, judges make things worse. (Manhattan Institute, Summer 1998, 12pp.)

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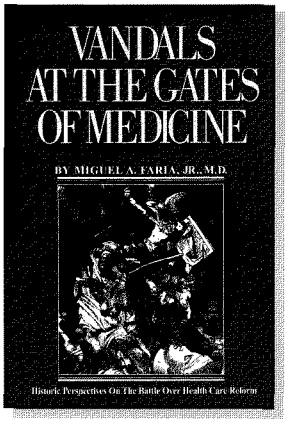


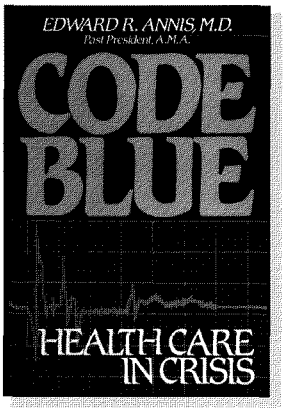
Vandals At The Gates of Medicine

Historic Perspectives on The Battle Over Health Care Reform

Miguel A. Faria, Jr., M.D.

Miguel A. Faria, Jr., M.D. provides compelling arguments that answers to the dilemma of health care reform reside on the pages of history. This fascinating book draws parallels between the past and the present, from a time when the fine line separating myth and history was blurred and indistinguishable to the clearly troubled present.

(403 pp., 1995, Illustrations, Bibliography, Index, ISBN: 0-9641077-0-8, $41.95)



Code Blue

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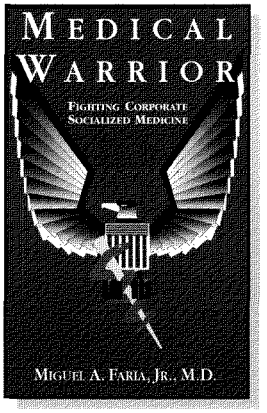
Edward R. Annis, M.D.

What the press doesn't tell the public—but Dr. Annis does—is that health care problems have a "Made in Washington" label. *Code Blue* shows how with "minimal changes in our tax laws, Medisave accounts would empower the patient by breaking the tie between job and health insurance and even would allow the gradual phasing out of Medicare."

(278 pp., 1993, Index, ISBN: 0-89526-515-X, $21.95)



NEW!

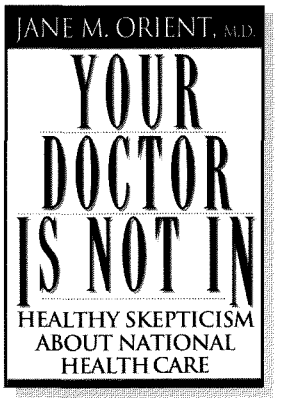
Medical Warrior

Fighting Corporate Socialized Medicine

Miguel A. Faria, Jr., M.D.

In this book of essays, Dr. Faria, argues that managed care and HMOs are not "free market" alternatives, but rather an unholy partnership of government and corporate interests seeking monopolistic government protection to eliminate competition while changing the ethics of medicine from a Hippocratic ethic to a false corporate morality. *Medical Warrior* offers workable solutions to restore medicine to its rightful place.

(207 pp., 1997, Selected Bibliography, Index, ISBN: 0-9641077-2-4, $23.95)

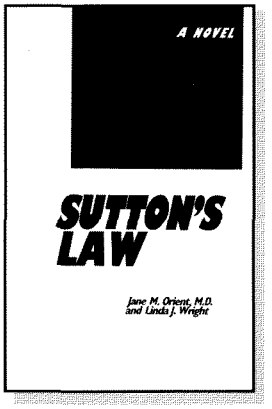


Your Doctor Is Not In

Jane M. Orient, M.D.

In this provocative book, a brilliant, committed physician, a leader in medicine argues for solutions to the crisis in medicine that are bold, thoughtful, and fundamentally opposed to those being widely touted today—including "managed care" systems. From her perspective, there is already too much government involvement in medicine, too much regulation, too much insurance—which is actually prepayment in disguise. These are the root causes of the accelerating rise in fees and costs, the neglect of patients, and stagnation in the science of medicine itself. This book is certain to add fresh energy to the debate over the quality and availability of medical care in America.

(276 pp., 1994, Index, ISBN: 0-517-59011-5, $23.00)



NEW!

Sutton's Law

Jane M. Orient, M.D. and Linda J. Wright

Sutton's Law is a "frightening realistic novel about where managed care might very well lead us...A mix of medicine, mystery, murder, and intrigue with a little high finance, drugs, and romance—*Sutton's Law* ultimately is about greed and simple justice."

(299 pp., 1997, ISBN: 0-9641077-1-6, $21.95)

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Privatization

Adrian Moore

Adrian Moore is director of privatization and government reform for the Reason Public Policy Institute.

Improving Infrastructure Development

The engine of our economy hums on a backbone of infrastructure—the roads, bridges, seaports, and airports that facilitate commerce and connect resources; the water and sewer systems that sustain living and working spaces; and the schools and other facilities that support the more intangible elements of economic growth.

Infrastructure stewardship ought to be central to a state's economic development policies, but infrastructure requires big money up front and more money to maintain. The consequences of putting off necessary infrastructure work are almost never immediate. Instead, they are buried in accident statistics and in shoddy schools, polluted water, and travel delays.

Now, thanks to deferred spending, expanding population and commerce, and a rising standard of living that demands better infrastructure, states nationwide have racked up nearly $2.5 trillion in infrastructure backlogs and needs. For example:

- Nearly two-thirds of the nation's roads and highways need improvements. (Outdated roadway safety features are a factor in 30 percent of all fatal highway accidents.) The cost: $264 billion just to tread water, another $94 billion to make the backlogged improvements.
- Almost one-third of bridges in the nation are structurally deficient. The cost: $80 billion to eliminate the backlog.
- Air travel has expanded dramatically since deregulation, but airport infrastructure has not kept pace. The cost: $60 billion for airport development and reconstruction over the next five years.
- Rising environmental standards for safe drinking water and clean waterways can be met only with improved water and wastewater infrastructure. The cost: nearly $2 trillion over the next 20 years.

There are arguments aplenty about whether in fact all these needs are legitimate. But state governments' role in coordinating, funding, and sometimes providing infrastructure to support the economy remains crucial. State governments need to pay more attention to infrastructure or else reap the consequences with less economic development.

State funding of infrastructure projects creates pots of money that all too often become pots of pork. State legislators should constrain themselves to funding statewide projects, leaving local and regional projects to local and regional governments.

Another option is to encourage private, rather than government, infrastructure projects. Enabling private toll roads, as California and other states have done, puts some of the onus for determining where roads are needed—and funding them—on private companies instead of taxpayers.

THE STATE PROJECT DESIGN MONOPOLY

State agencies and local governments have long used private firms to contain costs and improve project quality and speed by supplementing their own project design, engineering, construction, and maintenance staff. But state laws restricting public-private partnerships to deliver infrastructure abound. Bidding laws, for example, require low-bid selections for technical projects where best-value selections are necessary.

Some states forbid outright outsourcing work on infrastructure projects. In California, the state courts have bizarrely interpreted simple language in the state constitution calling for a state civil service system to mean the state cannot contract for any service state employees can perform. And that is only the most absurd example of a common problem. Colorado and Hawaii face similar constitutional constraints; other states have similar laws on the books.

Legislators should be looking at ways to enable and encourage agencies and local governments to use private partners when doing so will save taxpayers money, cut project delivery time, or improve project quality.

> *Alternative project structures can dramatically reduce the cost and schedule creep that plague large construction projects.*

Innovative structures for large infrastructure projects—from combining the design and build contracts (design-build) to turnkey delivery—are revolutionizing the process of getting things built. Research confirms these alternative project structures can dramatically reduce the cost and schedule creep that plague large construction projects.

A recent study conducted by the Pioneer Institute compared growth in construction project costs and schedules across four states: Massachusetts, Florida, Texas, and Indiana. The latter three, which allow alternative project structures such as design-build, have 2 to 10 percent less cost creep and 40 to 50 percent less schedule creep than did Massachusetts, which severely restricts project structures. Many states have restrictions similar to Massachusetts'; as a result, they cost the taxpayers millions of dollars a year and needlessly delay construction of public projects. All states should liberalize their procurement laws to allow the full range of project structures.

FOR MORE INFORMATION...

How Big Should the Capital Stock Be?
How much infrastructure is enough? (Jerome Levy Institute, September 1998, 5pp.)

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Regulation

Murray Weidenbaum

Murray Weidenbaum is chairman of the Center for the Study of American Business.

The Return of Benefit-Cost Analysis

The U.S. Supreme Court recently signaled that benefit-cost analysis might become more widely used in government regulatory decisions. Deciding on May 30 to expand its continuing review of the Clean Air Act, the Court said it will decide whether the statute requires the government to look beyond the public health benefits of reducing air pollution and to consider the economic costs as well.

Originally, the Supreme Court agreed to hear the Clinton administration's appeal of a federal appeals court finding that the Clean Air Act, as interpreted by the Environmental Protection Agency, gave the agency excessively broad authority of a legislative nature. The lower court held the broad authority assumed by EPA amounted to an unconstitutional delegation by Congress of its lawmaking power.

In the May action, the Supreme Court granted a separate appeal, filed by the American Trucking Association, that asked the justices to look at the Clean Air Act in a different way. This alternative approach—interpreting EPA's rulemaking authority to include a requirement to do benefit-cost analysis—could avoid the entire question of excessive delegation of congressional power.

Requiring EPA to analyze the benefits and cost of regulation, it can be argued, preserves the constitutionality of the Clean Air Act by limiting the agency's discretion in issuing regulations under the Act. As would be expected, the Clinton administration opposed the trucking association's appeal, but unsuccessfully.

The substantive issue involved in the Supreme Court review of the Clean Air Act is the highly controversial standards EPA issued in 1997 for ozone and small airborne particles. At the time, the scientific basis for issuing the newer and tougher standards was criticized as very weak. The old standards were working and the air was getting cleaner. In comparison to the substantial costs that would be imposed by the new standards, many analysts concluded the additional benefits in terms of improving human health would be very modest.

The courts have not ruled directly on the scientific basis for the standards. Nevertheless, if the agency is required to analyze the benefits and the costs of the standards while they are being written, there is some likelihood that less-onerous standards would be promulgated. In any event, EPA's efforts at pollution control would have to address the fundamental question the agency has ignored in administering the Clean Air Act: *Is the government doing more good than harm?*

Viewed in this broader light, we can see that the debate over benefit-cost analysis is not a narrow matter of statistics or accounting. Rather, should the trucking association's appeal prevail, more basic questions could be raised in the regulatory process: Is there a better way of achieving Congress's goals? What are the side effects of the proposed regulation? How will the new (or expanded) regulation relate to the existing and very substantial body of regulation? On balance, will the government be doing more good than harm?

BENEFIT-COST ANALYSIS PROHIBITED

The key reason these issues are going to the Supreme Court is that, in 1980, the Court of Appeals for the District of Columbia ruled—in the precedent-setting *Lead Industries* case—that the law prohibited EPA from considering any factor other than public health. Only the Supreme Court can overrule that earlier decision. If the *Lead* decision is reversed, the outlook for more sensible regulation will brighten substantially.

> *Interpreting EPA's rulemaking authority to include a requirement to do benefit-cost analysis could avoid the entire question of excessive delegation of congressional power.*

Nevertheless, a benefit-cost test is no panacea for overregulation. The onus will still be on Congress to enact more realistic regulatory legislation in the first place. In many cases, the regulatory agency has too little, rather than too much, discretion and thus cannot select the most cost-effective way of achieving the objective.

It is important for the courts—and other decisionmakers—to understand the limits of benefit-cost analysis. For example, it is not a cost-minimization strategy. Frequently, a *larger* investment will show a higher benefits-to-cost ratio because it can generate more net benefits than a smaller outlay.

Perhaps the overriding value of benefit-cost analysis is to demonstrate the importance of making objective evaluations of essentially subjective actions and narrowing the area in which subjective forces dominate. Thus, if economically inefficient programs are adopted, government decisionmakers at least know the price being paid for those actions.

FOR MORE INFORMATION...

The ABC's of Regulatory Reform
It's easy to complain about regulatory bureaucrats but *Congress* should lead the way to reform. (Competitive Enterprise Institute, March 1999, 2pp.)

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Taxes

Bill Ahern

Bill Ahern is communications director for the Tax Foundation.

Low-Tax State? Think Again

All things equal, a state with a lower tax burden is a more attractive place to work and live than a state with a higher one. But only when the federal collections are stripped out of tax data do the true low-tax states stand out.

A closer look at the Tax Foundation's year 2000 analysis of total tax burdens by state reveals a surprise: Many states with high overall tax burdens, relative to other states, actually rank fairly low when judged by their state and local taxes alone—and vice versa. The analysis covers all the various taxes paid by individuals and businesses to local, state, and federal governments.

The total average tax rate for residents of Connecticut is the highest in the nation, at nearly 40 percent (37.9); taxpayers in Maine face the seventh-highest total tax burden. When only state and local taxes are considered, however, Maine's taxpayers pay the highest average tax rate in the nation, while Connecticut falls to number 12.

The average state and local tax rate in Maine (13.3 percent) edges out New York's (13.1 percent) for the dubious distinction of having the highest state/local tax burden.

West Virginia and Hawaii rise most dramatically in the rankings of most-heavily taxed states. West Virginia, ranked only number 43 on total tax load, comes in at number 18 when its residents are measured solely by their state and local taxes. Hawaii moves from 27th to 3rd highest. Mississippi, ranking lowest in total tax burden, rises to nearly the middle of the pack (at 29) when only state and local taxes are counted.

While Connecticut falls from highest in the nation to 12th highest for state/local taxes, many states fall even further in the ranking. Wyoming drops the furthest, all the way from 2nd to 44th. New Hampshire and Florida both drop 25 places in the ranking when federal taxes are removed from the calculation: New Hampshire from 23rd to 48th, and Florida from 8th to 33rd. Illinois drops 19 slots from 15th to 34th, and Nevada drops 18 slots from 9th to 27th.

Federal income taxes, being more progressive than most state taxes, boost the rankings of the more affluent states when the total tax load is calculated, thus obscuring the relative ranking of tax burden by states and local governments.

Average State and Local Tax Burden by State

State	State and Local Tax Burden	State/Local Rank	Total Tax Burden	Total Burden Rank
Maine	13.3%	1	34.9%	7
New York	13.1%	2	36.4%	3
Hawaii	12.5%	3	33.0%	27
Wisconsin	12.2%	4	35.4%	5
Utah	12.0%	5	33.9%	17
Vermont	11.8%	6	34.5%	12
Rhode Island	11.5%	7	34.6%	11
Nebraska	11.3%	8	34.0%	16
Ohio	11.0%	9	33.8%	20
Minnesota	11.0%	10	34.4%	13
Idaho	10.9%	11	33.1%	26
Connecticut	10.8%	12	37.9%	1
New Mexico	10.8%	13	33.1%	25
New Jersey	10.8%	14	35.9%	4
Iowa	10.7%	15	32.9%	28
California	10.6%	16	33.9%	18
Washington	10.6%	17	35.1%	6
West Virginia	10.6%	18	31.3%	43
Kansas	10.4%	19	33.4%	21
Indiana	10.3%	20	33.3%	24
North Carolina	10.3%	21	32.8%	29
Pennsylvania	10.2%	22	33.3%	22
Massachusetts	10.2%	23	34.6%	10
Maryland	10.2%	24	34.2%	14
Georgia	10.0%	25	32.7%	31
Virginia	10.0%	26	32.5%	34
Nevada	10.0%	27	34.7%	9
Arkansas	10.0%	28	31.4%	42
Mississippi	10.0%	29	31.0%	50
Louisiana	9.9%	30	31.9%	37
Michigan	9.9%	31	33.9%	19
Oklahoma	9.8%	32	31.2%	45
Florida	9.7%	33	34.8%	8
Illinois	9.7%	34	34.1%	15
Missouri	9.6%	35	32.6%	32
Delaware	9.6%	36	32.6%	33
South Carolina	9.6%	37	31.7%	40
Montana	9.5%	38	31.8%	38
North Dakota	9.5%	39	31.2%	44
Kentucky	9.4%	40	31.1%	48
Oregon	9.3%	41	32.8%	30
Arizona	9.3%	42	32.4%	35
South Dakota	9.1%	43	31.7%	41
Wyoming	9.1%	44	36.7%	2
Alabama	9.0%	45	31.1%	49
Texas	9.0%	46	31.8%	39
Colorado	8.7%	47	32.0%	36
New Hampshire	8.5%	48	33.3%	23
Tennessee	8.5%	49	31.2%	46
Alaska	6.8%	50	31.2%	47
District of Columbia	14.4%		37.6%	
TOTAL	10.4%		33.8%	

FOR MORE INFORMATION...

The Case for a Tax Supermajority: A Look at the States
Supermajority rules work at the state level to promote economic growth and restrain public spending. (Citizens for a Sound Economy, April 1996, 6pp.)

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Technology

Bartlett D. Cleland

Bartlett Cleland is director of the Center for Technology Freedom at the Institute for Policy Innovation.

Digital Divide: Rhetoric vs. Reality

In a Presidential election year a certain level of rhetorical excess can be expected, as politicians desperately need to gain an advantage one over the other. This year is no exception.

Technology has become a hot topic in politics, just as it has in the stock market and around the water cooler. Now Presidential politics and technology have collided, and the grist for the political mill is the so-called "digital divide." The President's recently announced "call to action" to close the supposed divide is a prime example.

We should question the existence of this digital divide. When people-who-worry speak of the digital divide, what they mean is access to the Internet (particularly at home), or rather the lack thereof. But Forrester Research has reported more than 43 percent of households already have access to the Internet. Any college marketing student can explain that since the Internet has been commercially available for less than 10 years, and is still in the birth and evolution phase, 43 percent household penetration is remarkable.

Six percent of Americans, and about 7 percent in inner-city areas, are not connected to the world with a telephone.

Wiring people who don't want Internet access, on the other hand, is a waste of money. Consider the Commerce Department's survey of those with Internet access at home, work, or school. Forty percent of those who already had a computer at home were not using the Internet there because they do not want to, do not find it useful, or do not have the time to use it. Assuming these usage patterns would hold true if tax dollars were spent to put a computer into every house, approximately 40 percent of them would go to waste. In fact, the percentage may be even higher as we find the real reason some homes do not have computers now: Some people simply don't want them.

PUBLIC ALREADY SERVED

The case for government intervention gets weaker every day. For example, Ford Motor Company has announced it will provide a computer, printer, and Internet access to all 350,000 of its employees for only $5 a month. Delta Air Lines is following suit with its 72,000 employees. Daimler-Chrysler, as well as a "national health care company," are reportedly considering the same. Nearly 95 percent of all schools are now online, and an increasing wave of companies now offer free Internet access. As the current trend to free access continues, the rationale for a government program consistently erodes.

How can any government hope to compete? Government simply cannot, and never will be able to, keep up with the dynamic changes of technology. The "digital divide" rhetoric is just a poor solution in search of a problem.

Interestingly enough, we have not heard much about the great telephone divide, maybe because it does not sound as techno-trendy. Six percent of Americans, and about 7 percent in inner-city areas, are not connected to the world with a telephone. More than 120 years after the creation of Ma Bell, market penetration of the telephone is still less than complete.

It's curious that we hear cries for the government to supply the country with computers even while many people do not have available the current, least-expensive means of going online. Why then the urgency to hand out computers and access to the Internet less than 10 years after first commercial use of the Net?

Before embarking on a new entitlement program, we should also carefully consider what the Internet will be in the future. Internet observers believe it will cease to exist as we know it.

As the current trend to free Internet access continues, the rationale for a government program consistently erodes.

We do not have to think hard to imagine a future where we don't have to access anything. The Internet will become part of our electronic devices. A current IBM commercial, for example, posits a refrigerator signaling the repairman without the owner needing to intervene. In that world, having a computer to access the Internet will seem cute and antiquated—all at the taxpayer's expense.

The President has proudly declared that companies are "signing on" to his call to action. In fact, those companies all along have been addressing the "problem" without any government involvement.

Calling for the end to an artificial divide makes for good politics and, unfortunately, probably will continue to attract attention. But as a problem, the divide exists in politics, not reality. And the difference between reality and politics? Well, now, *there* is your divide.

FOR MORE INFORMATION...

The Digital Economy Fact Book
How large is the digital economy? Here's an overview. (Progress and Freedom Foundation, 1999, 7pp.)

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Welfare

Understanding Differences in Black and White Child Poverty

Robert Rector and David Muhlhausen

Robert Rector is a policy analyst and David Muhlhausen is a research assistant at The Heritage Foundation.

President Clinton recently complained of a "racial ravine" that separates black and white Americans. Bill Bradley, former U.S. Senator from New Jersey, has frequently charged that whites benefit from a "white skin privilege" that gives them unfair advantages over blacks.

Strong differences between black and white America do exist, most notably in child poverty. According to the U.S. Census Bureau, in 1998, 36.7 percent of black children under 18 lived in poverty compared to 15.1 percent of white children.

Why do such differences in poverty exist? To answer this question, we recently examined data from the Labor Department's National Longitudinal Survey of Youth (NLSY), which contains a statistically representative sample of black and white children born between 1978 and the present. Analysis of this rich database provides three important conclusions.

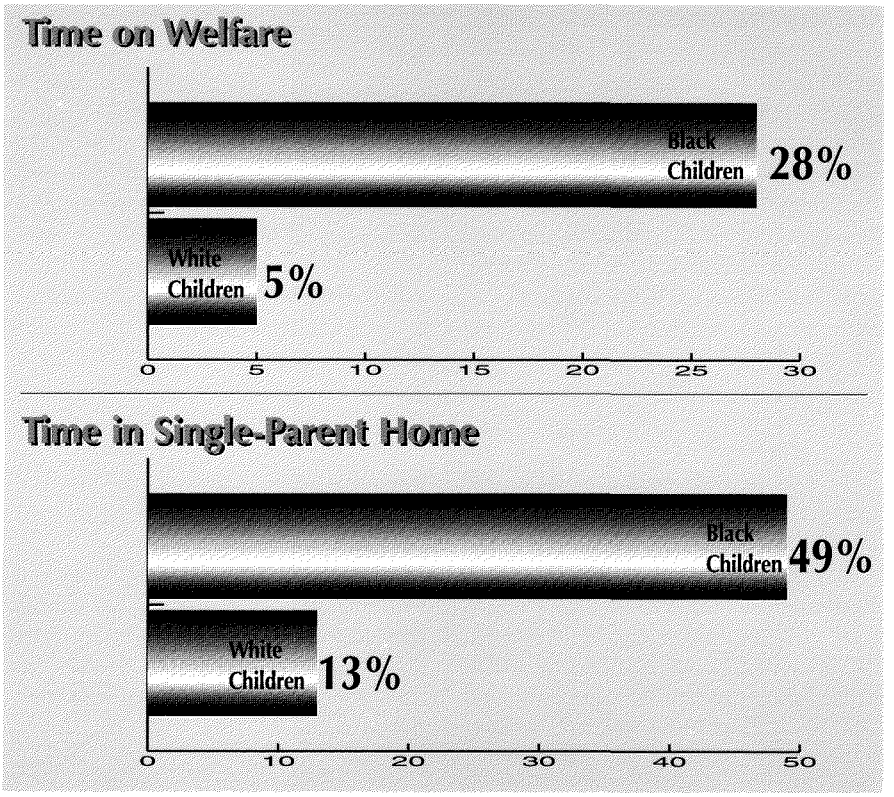
- Race, per se, has no direct effect in determining whether children live in poverty.
- While black children are more likely to be poor than white children, the higher black poverty rate is predominantly caused by the fact that black children spend more time on welfare and in single-parent homes than do white children.
- If a black child is compared to a white child who has spent the same amount of time living on welfare and in a single-parent home, the poverty rate of the two children, on average, will be exactly the same. It is welfare dependence and single parenthood, not skin color, that determine the likelihood a child will live in poverty.

Differences in welfare dependence between white and black households are striking. Black children in the NLSY sample received Aid to Families with Dependent Children (AFDC) benefits for 28 percent of their lifetimes since birth, compared to 5 percent among white children. (AFDC has now been renamed Temporary Assistance to Needy Families, or TANF.)

Racial differences in single parenthood are equally strong. Black children, on average, resided in single-parent homes for 49 percent of their lives. By contrast, white children resided in single-parent homes 13 percent of their lives. The high number of black children living in single-parent homes should not be surprising, since 69 percent of black children are now born out of wedlock, compared to 26 percent of white children.

Ironically, those who complain most vociferously about high levels of black poverty in the U.S. studiously ignore the social factors that produce poverty. Neither black Americans nor society benefit from such obfuscation.

The bottom line is simple: If the levels of welfare dependence and single parenthood within the black community were reduced to match those in the white population, the disparity in white and black child poverty rates would all but disappear. Public policies that fail to address the critical and inter-linked problems of dependence and illegitimacy will also fail to achieve a significant and enduring improvement in the lives of children.



FOR MORE INFORMATION...

Why Congress Should Consider Alternatives to Raising the Minimum Wage
There are better ways to help the poor than raising the minimum wage. Here's a few. (The Heritage Foundation, September 1999, 2pp.)

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Litigative vs. Legislative Democracy

by Doug Bandow

As the U.S. Presidential race moves into high gear, the candidates are talking about everything from health care to election reform. But they have ignored one of the most important issues: lawmaking through lawsuit.

The liability explosion has entered its third decade with few signs of abating. No one disputes the importance of holding people responsible for damages or injuries caused by their negligence. Unfortunately, today the law increasingly imposes liability irrespective of blame or causation.

The consequences have been many. There are a few winners: trial attorneys, for example, now collect not just millions, but *billions* of dollars in fees.

The losers, by contrast, are legion. Everyone pays higher insurance premiums. Kids suffer when fear of liability suits causes nonprofit groups and governments to curtail recreational activities and close parks. School and subway systems pay big judgments to burglars and drunks. Companies, such as the producers of silicone breast implants, end up in bankruptcy even when research demonstrates their innocence.

And the public finds itself living under rules made by lawyers rather than legislators. Whether products or services are available, how much they cost, what kind of advertising can appear, and other questions are now decided in courtrooms without the public's input.

Curiously, many of the strongest proponents of lawmaking by lawsuit otherwise style themselves as populist defenders of the masses. They routinely advocate more democracy and citizen control.

But not in this instance. In their view, the business goose must be plucked—and it doesn't matter how.

Former Labor Secretary Robert Reich articulated this view last year, when he argued that the era of big government really wasn't over, since litigation was supplanting regulation. It might not be efficient, he said, "but perhaps regulating through lawsuits is better than not regulating at all."

However, this attitude presupposes that regulation, and a particular kind of regulation, is necessary. And that the public doesn't have the right to say no.

For instance, lawyers simultaneously enriched themselves and made policy through suits against the silicone breast implant and tobacco industries. In the breast implant case, they created a national scare. Yet science subsequently demonstrated the hysteria to be unfounded.

The tobacco litigation had equally dramatic effects, hiking cigarette prices and restricting advertising. The companies settled for $246 billion, a *de facto* tax hike imposed without the approval of any legislature. Yet cigarettes were already one of the most heavily taxed products in the U.S. marketplace.

These dubious successes have motivated a spate of lawsuits against gunmakers. Other targets include the alcohol industry, lead paint producers, HMOs, and even the dairy industry.

Indeed, lawyers could end up running the entire economy. There are few goods and services that could not be attacked as dangerous, harmful, or wasteful; there are few ads that could not be criticized as inaccurate, misleading, or useless. All could be legally suspect.

PERFECTION, OR DEMOCRACY?

The results of more lawmaking by lawsuit aren't likely to be pretty. The legislative process is imperfect, but a refusal to act is, in fact, a legitimate answer by the democratic political system. The nation's founders wanted to inhibit government meddling and force policymaking to incorporate at least some possibility of deliberation and compromise.

Not so litigation. Neither lawyers nor judges have any expertise to regulate individual companies, let alone entire industries.

What makes litigious lawmaking particularly dangerous is the fact that many cases never even reach a judge. This point may have helped cause Robert Reich to lose his enthusiasm for mass torts. The goal of actions like those against tobacco and guns, he wrote earlier this year, "is to threaten the industries with the risk of such large penalties that they'll agree to a deal."

That is, laws are being made by litigants, the most special of special interests.

Politics is a bad way to make policy. Litigation is worse. Neither lawyers nor judges have any expertise to regulate individual companies, let alone entire industries.

This process obviously threatens the basis of a democratic republic. Such lawsuits, worries Reich, represent "blatant end-runs around the democratic process," especially when dependent on "the discretion of administration officials operating in utter secrecy."

Sure, democracy is flawed. But turning government over to lawyers is no solution. Instead, as Reich now argues, "the answer is to make democracy work better." And to accept no regulation as a legitimate political response.

Politics is a bad way to make policy. Litigation is worse. If Americans want to preserve more than the mere pretense of a republic, they must reject attempts to legislate through lawsuit.

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Doug Bandow is a senior fellow at the Cato Institute, a Washington, DC-based think tank.

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Excerpt

Reforming an Ambitious State Health Care System

By Patrick S. Poole

On May 7, 2000, the Tennessee Institute for Public Policy released Policy Study 115, "A Proposal for Comprehensive TennCare Reform." Copies of the 44-page report may be obtained from the Tennessee Institute for Public Policy at P.O. Box 23348, Nashville, TN 37202. Call 615/327-3120 or visit www.tnpolicy.org.

On January 1, 1994, Tennessee embarked on an ambitious course to fundamentally change the state's Medicaid system. The stated intent of the new program—TennCare—was to implement a managed care system to control the runaway growth of Medicaid expenditures seen during the close of the 1980s and the beginning of the 1990s under the fee-for-service payment system. The anticipated managed care savings would then be used to expand coverage to the uninsurable and the non-poor uninsured.

DEMISE INEVITABLE

To accomplish this feat, then-Governor Ned McWherter requested a Section 1115 waiver from the federal Health Care Financing Administration (HCFA) to mandate managed care for all TennCare enrollees and to allow coverage for those not eligible under Medicaid. After receiving HCFA approval, the state contracted with 12 managed care organizations (MCOs) to provide health care services to the entire TennCare population under a capitated rate payment system.

Six years later, TennCare teeters on the brink of complete collapse. Most of the savings associated with managed care have not been achieved through better utilization of health care services, but rather by deliberately under-estimating the capitated rates paid to MCOs, which passed off those losses to health care providers. The net effect has been a decline in the overall quality of health care for all Tennesseans.

Recent developments have made the demise of the program all but inevitable. Chief among the causes is the December 15th announcement by Blue Cross/Blue Shield of Tennessee—the largest TennCare MCO, covering one-half of all enrollees—that it would withdraw from the program effective June 30, 2000.

OBSTACLES TO EFFECTIVE REFORM

While universal coverage and single-payer system proposals have gained some attention, no other state has embarked on such a grandiose effort down those paths. Incorporating those goals into our state's Medicaid system has created a program difficult to maneuver and finance, while erecting substantial barriers to reform.

The following obstacles need to be addressed to prevent further complications in providing a health care safety net for Tennessee's indigent and medically needy populations.

Obstacle 1: TennCare is attempting to serve nine different populations with one product.

There are four distinct populations with Medicaid eligibility: poor children and adults, the near-poor insured, the disabled, and the elderly. Another five categories have been added to the Medicaid-eligible population within TennCare: uninsured children, the mentally ill, uninsured workers, Medicare supplemental, and the uninsurables denied insurance due to health risks.

The best way to serve so many distinct populations would be to empower enrollees themselves with the tools to choose what plan on the private market best fits their health needs. In concept, this is what TennCare was supposed to be, but Medicaid mandates and self-imposed program designs have all but eliminated plan variation among Tennessee MCOs.

Obstacle 2: TennCare is out-of-line with state Medicaid programs on the regional and national levels.

Tennessee has the 7th largest Medicaid enrollment in the country, despite having only the 17th largest population. In 1998, Tennessee had the 2nd largest Medicaid population of any state as a percentage of the state's population: 20.1 percent. The national average is roughly half that figure, at 10.4 percent.

> *On January 1, 1994, Tennessee embarked on an ambitious course to fundamentally change the state's Medicaid system. Six years later, TennCare teeters on the brink of complete collapse.*

Obstacle 3: TennCare has extended health care entitlements well beyond the indigent and medically needy.

Among Medicaid programs, Tennessee's has the greatest non-poor population in the country at one-third of TennCare enrollment: 74 percent above the national average.

The reason for this is readily evident. By enrolling in TennCare, enrollees are able to shift most or all of their health care costs to the taxpayers—an attractive proposition. For instance, in fiscal year 1998 TennCare collected only $36 million from more than 500,000 non-poor uninsured and uninsurable enrollees required to pay premiums. For that year, the average premium payment from this non-poor population was $72, compared with the $2,867 per-recipient cost for that year.

Obstacle 4: TennCare has caused the quality of health care to decline for all Tennesseans.

Since the inception of TennCare, 11 hospitals across the state have closed, five in the last 18 months alone. Hospitals are limiting or closing needed services simply due to the mounting financial pressures attributed to TennCare. Vanderbilt University Medical Center, for example, has considered turning away non-emergency TennCare patients.

The TennCare-related losses experienced by hospitals and doctors have ripple effects that extend to those covered by private insurance as well.

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Obstacle 5: TennCare is stressing the state budget to the breaking point.

Since fiscal year 1990, the largest budget category increases in Tennessee have been for health and social services, climbing 231 percent. With its current rate of growth, TennCare will consume more state dollars than K-12 education within the next five or six years.

TennCare was intended to *save* Tennessee from double-digit growth in Medicaid spending, not condemn us to it. The average growth of TennCare over the past three years has been 14.7 percent, well above the growth rate seen in most other states.

A PROPOSAL FOR REFORM

State leaders have two options for addressing this crisis. The choices could not be more pronounced.

A "public society" approach would encourage greater government intervention in the health care provider and insurance sectors. Efforts to prop up TennCare in this way would result in increased costs for consumers with private insurance coverage, run-away health care spending growth in the state budget, and further decline in the quality of health care services available to Tennessee citizens.

A "civil society" approach, by contrast, would reverse the present course of consolidation and health care homogenization and incorporate realistic private alternatives to allow the free market to distribute health care resources more efficiently. Several solutions are available to lawmakers who choose this course of action:

Solution 1: Reform eligibility and expand efforts to attack fraud and abuse.

TennCare's public image has been marred by repeated revelations of gross fraud and abuse over the past year. There are several remedies. Most important is that TennCare perform its annual verification of the rolls in compliance with HCFA requirements under the Section 1115 waiver. Another remedy is to dedicate more resources within the Tennessee Bureau of Insurance's Medicaid Fraud Control Unit.

Solution 2: Implement market-based Medicaid reforms.

Because consumers of health care under Medicaid do not pay for the services they use, rising health care costs do not lower the demand for services by this population. They consume services more frequently and typically use more costly care than do consumers paying for services with private insurance.

To address this effect, a few states, such as Minnesota, have introduced cost-sharing for Medicaid recipients, similar to measures used in private managed care programs. The primary cost-sharing provisions in Minnesota are a 10 percent coinsurance for inpatient hospital stays, a $3 copay on prescription drugs, and a 50 percent coinsurance for dental.

Medicaid reform also must emphasize personal responsibility and provide flexibility to accommodate each recipient's needs. These goals can best be accomplished through health insurance vouchers and Medisave accounts for the non-elderly and non-disabled.

Solution 3: Create a stand-alone children's health insurance program.

Under the State Children's Health Insurance Program (S-CHIP), there are three separate approaches to creating a program for uninsured low-income children: expand Medicaid, set up a stand-alone program, or create a program that combines Medicaid and stand-alone features.

There are significant problems with the first approach, S-CHIP Medicaid expansion. Medicaid coverage is expensive due to mandates and other regulations that extend well beyond S-CHIP requirements. Thus, Tennessee's Medicaid expansion results in limiting the number of children under the S-CHIP program.

If it were to create a stand-alone program, the state would have many options available to it. A state that chooses this approach may introduce limited cost sharing and target specific age groups or geographic areas with a concentrated number of uninsured children. An extra benefit is that from a financial perspective, creating a stand-alone S-CHIP program maximizes the benefit from the federal S-CHIP allotment.

Solution 4: Re-establish a high-risk pool for uninsurables.

One of the most costly decisions associated with the formation of TennCare was to open enrollment in the program to categorically non-poor uninsurables. This decision has resulted in tremendous financial pressure on TennCare MCOs.

Continuing to extend the Medicaid entitlement to the non-poor uninsurables is unsustainable. The solution is to revive the Tennessee Comprehensive Health Insurance Program (TCHIP) high-risk pool, modifying it to incorporate "best practices" of other states.

The expansion of the Medicaid entitlements beyond the indigent and the medically needy fundamentally altered the purpose of the state's Medicaid program.

Solution 5: Transition the uninsured back to the private sector.

When TennCare began in January 1994, the problem of insurance portability was growing more pronounced. TennCare was seen as an alternative.

However, the federal Health Insurance Portability and Accountability Act of 1996 (HIPPA) mandates portability and guaranteed renewability of insurance in many situations. This new federal law makes TennCare eligibility for the uninsured redundant. Those TennCare recipients are now able to go out into the private marketplace and obtain insurance. But due to the generous benefits package and low, taxpayer-subsidized premiums, few have been willing to leave TennCare.

Solution 6: Increase charity payments to providers and create a statewide charity care network.

In restructuring TennCare, consideration should be given to increase funding for charity care. Encouragement should be given for the establishment of local charity care networks associated with the state-supported hospitals in each region.

Solution 7: Separate mental health services from TennCare.

Because of the very limited savings associated with managed care for the mentally ill and the delicate and cost-intensive nature of this small population, the state's mental health efforts ought to be separated from TennCare altogether and redesigned to ensure access and appropriate funding for all service providers.

The expansion of Medicaid entitlements beyond the indigent and the medically needy fundamentally altered the purpose of the state's Medicaid program. The double-digit health care cost increases that prompted Governor McWherter to begin TennCare have returned with a vengeance, making the program financially unsustainable. In order for TennCare to survive, it must undergo much more than superficial reforms.

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The Rise of the Hidden Tax

by John McClaughry

Any tax economist will explain that a tax has four characteristics: It is imposed by a government; it is paid by individuals and businesses to some government entity; compliance is mandatory; and it is not paid in direct exchange for a service.

A tax levied on income received, or retail purchases, or property value, or rooms and meals, is what most people think of as a tax. A car registration, hunting license, bridge toll, and lottery ticket are not taxes, because you don't have to pay them if you don't own a car, hunt, use the bridge, or play the numbers.

In more responsible days, legislators voted openly to levy taxes, which were called "taxes."

In recent years legislators, mindful of political resistance to increasing tax rates, have concocted a number of alternatives. One is a shift to user fees. This is justifiable, because user fees shift the burden of costs borne by the public to those who benefit directly. The Vermont Fish and Wildlife Fund, for instance, has long been financed almost entirely by federal taxes on hunting and fishing equipment and hunting and fishing license proceeds. There is no good reason why non-sportsmen should be made to finance the benefits enjoyed by sportsmen.

Legislators, mindful of political resistance to increasing tax rates, have concocted a number of alternatives. The most devious is the practice of levying hidden taxes.

The more devious alternative to traditional taxation is the practice of levying hidden taxes. These are mandatory charges typically smuggled into utility bills to pay for some scheme the legislators don't dare raise general fund taxes to pay for. The champion example of such hidden taxes is the so-called "Gore tax."

The Gore tax, so named because Vice President Al Gore is its most enthusiastic proponent, was levied not by Congress but by the Federal Communications Commission. Congress had passed a law in 1996 requiring telecommunications carriers to give discounts for Internet connections to schools and libraries.

Without any statutory authority, the FCC created a new public corporation. To pay for its politically ambitious grant-making program it then levied a consumer tax of around 5 percent (depending on the carrier), which is bringing in $2.4 billion a year. When AT&T thought it would be a good idea to itemize this illegal tax on its customer bills, the FCC whipped out a rule to make sure customers couldn't find out how much they were being taxed.

VERMONT LEVIES NON-TAX TAXES

In Vermont, this kind of hidden taxation to fund programs deemed worthwhile by legislators has become very popular. In 1990 the legislature enacted a one-half percent tax on heating oil sales to produce funds for the home weatherization activities of community action agencies, a program then often regarded as an employment program for out-of-work members of the counterculture. This tax has been renewed every two years since. The Tax Department has sternly refused to allow fuel dealers to inform their customers how much they are paying for this tax.

The 1999 legislature invented a new electricity tax for the purpose of funding the Public Service Board's (PSB) energy-efficiency program. This was not a wholly new tax. It replaced mandated energy-efficiency expenditures made by the various utilities, which were previously included in electric bills. The $17 million a year the new tax produces is earmarked for the PSB, which recently issued a $28 million three-year contract for energy-efficiency promotion. This tax is also itemized on your electric bill.

The 2000 Senate has come up with yet another non-tax tax. Imaginatively called a "volumetric charge," it will add another tenth of a percent to your electric bill. The Public Service Board will spend the money to promote renewable and sustainable energy systems and technologies. In other words, government-favored purveyors of "renewable and sustainable" energy systems will be handed another million dollars a year, extracted from electric ratepayers, as a subsidy for their enterprises.

In more responsible days, legislators voted openly to levy taxes, which were called "taxes." The broad-based taxes went into one General Fund; the motor vehicle and fuel taxes went into the user-funded Transportation Fund. A wide range of state programs sought funding. The appropriations process parceled out the funds openly among the many claimants.

Now the model of choice in Montpelier is to levy invisible new taxes, label them "volumetric charges," earmark them for favored spending programs, and shield those programs from the visible competition of the appropriations process.

The old way was better.

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John McClaughry is president of the Ethan Allen Institute, a Concord, Vermont-based think tank.

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